

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

15 CR 867 (RMB)

5 MEHMET HAKAN ATILLA,

6 Defendant.

7 -----x
8 New York, N.Y.
9 November 6, 2017
11:07 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13
14 APPEARANCES

15 JOON H. KIM
16 Acting United States Attorney for the
17 Southern District of New York

18 MICHAEL LOCKARD
19 SIDHARDHA KAMARAJU
20 DAVID DENTON

21 DEAN SOVOLOS
22 Assistant United States Attorneys

23 HERRICK FEINSTEIN LLP
24 Attorneys for Defendant

25 BY: VICTOR J. ROCCO
THOMAS E. THORNILL
-and-

FLEMING RUVOLDT PLLC
BY: CATHY ANN FLEMING

ALSO PRESENT: ASIYE KAY, Turkish Interpreter
SEYHAN SIRTALAN, Turkish Interpreter
MICHAEL CHANG-FRIEDEN, Paralegal

1 THE COURT: So, sorry for the brief adjournment of
2 today's conference, which was a function of the work that the
3 attorneys did over the weekend, and I just wanted to make sure
4 I had absorbed all of that before the conference today. In the
5 order that was docketed this morning adjourning the conference
6 from nine to 11, I included a statement that there are from
7 here through trial no further submissions unless there's prior
8 order or approval by the Court. That is my practice in
9 criminal cases after motions in limine have been filed, so I'm
10 not expecting any further submissions.

11 You'll remember that the purpose of today's conference
12 was and is to resolve the issues between Mr. Atilla's counsel
13 and the government with respect to the protective order
14 agreement relating to documents in this case. As to that, the
15 parties signed and agreed to this protective order on or about
16 June 19, 2017, and actually entered into that arrangement even
17 before I was involved. I so ordered that agreement so it has
18 been and is in place. And that is the prearranged and noticed
19 focus of today's hearing.

20 Before I go any further I should mention that we have
21 Turkish language interpreters here and ask Mr. Atilla if he's
22 able to understand these proceedings with the help of the
23 interpreter.

24 THE DEFENDANT: Thank you, your Honor. Yes, I can.

25 THE COURT: Okay. So before we turn to the protective

1 order, there are a few things I'd like to discuss or
2 underscore, including something so very fundamental in our U.S.
3 system of justice and in our Constitution and which applies in
4 this and every other criminal case, whether the defendant is a
5 U.S. citizen or not, and that is the presumption of innocence,
6 which attached, is attached, has attached to Mr. Atilla and
7 which everyone who is interested in this case should be aware
8 of and understand that it applies, the presumption of
9 innocence, that is, 100 percent, no matter what we say in our
10 discussion today or at any other time during these proceedings
11 in considering and ruling upon defense counsel's various
12 applications, motions, and letters, for example.

13 Mr. Atilla has consistently maintained his innocence.
14 And even if he had not actively and vocally maintained his
15 innocence, he is presumed to be innocent of all the charges
16 against him. That is and has been true throughout these
17 proceedings and it remains true unless and until such time, if
18 it should occur, he is proven guilty beyond a reasonable doubt
19 after a trial by jury. And, in addition, Mr. Atilla is
20 entitled and understandably he has also consistently pressed
21 for in this court a speedy trial under our laws and our
22 Constitution.

23 The current trial date of November 27 I believe
24 satisfies Mr. Atilla's request for a speedy trial. Indeed,
25 that date of November 27, 2017 was requested by defense counsel

1 and I granted that request pushing back the scheduled trial to
2 this, which was then October 30, 2017, to November 27.

3 My recollection is that defense counsel requested
4 adjournments, including adjournment of the first selected trial
5 date, which you'll recall was August 21, 2017, to October 30,
6 2017, and then from October 30 to November 27, in each instance
7 with the expression by or on behalf of Mr. Atilla his
8 expression of eagerness to get to trial and to be vindicated,
9 which by the way I totally understand as well.

10 But just to put a fine point on it, the chronology is
11 as I recall the following, roughly.

12 On April 13, 2017, Mr. Rocco stated that "Mr. Atilla
13 just handed me a note and said I do not want to extend the
14 August 21, 2017 date. August is too far out."

15 No. 2, by letter, I think this was dated April 21,
16 2017. Defense counsel, Mr. Rocco, said with respect to
17 adjournment of the trial date, Mr. Atilla now understands that
18 because of the many complexities and challenges presented by
19 this case, it is in his interest, despite his being currently
20 detained, that the August 21 trial date be adjourned for the
21 reasons counsel set forth during the appearance of April 13,
22 2017. That was in a letter.

23 On April 24, Mr. Rocco said that with that
24 understanding and having a series of conversations with
25 Mr. Atilla and discussed with him the issues that are posed by

1 an August 21 trial date and given the amount of materials and
2 the way we think that discovery will unfold here -- it was in
3 court -- Judge, and it will include going abroad, talking to
4 witnesses abroad and having perhaps foreign depositions,
5 perhaps foreign depositions, I believe that the August 21 trial
6 date is impractical.

7 By order of the Court dated May 16, 2017, I determined
8 that upon defense counsel's request for additional time, the
9 Court is rescheduling this trial of this matter to Monday,
10 October 30, 2017.

11 In June of this year, Mr. Rocco advised the Court that
12 "we are working with the October 30 date in mind as a firm date
13 and Mr. Atilla, who is in custody, is anxious to keep that
14 date."

15 And so on June 12, 2017, in an order put out by me, I
16 stated that the Court notes that it earlier adjourned the trial
17 principally at counsel's or Mr. Atilla's request from August 21
18 to October 30, 2017.

19 Later, after the summer, on September 25, 2017,
20 Mr. Rocco mentioned or stated the following. "Given what
21 happened to me this summer and given the superseding
22 indictment, it was our intention to come into the court and to
23 request some additional time to prepare for trial and our
24 client has authorized us to make a request to November 27,
25 which is roughly a 28- or 29-day extension, in light of those

1 events." And, as a result, on September 25, 2017, I issued an
2 order in which I granted defense counsel's request for
3 adjournment of the trial to November 27, 2017.

4 This issue was the principal subject of the
5 correspondence back and forth over the weekend -- two letters
6 from the defense, I think, one on Friday, one on Sunday, and
7 one letter in between from the government. I think I have that
8 right.

9 So let me just say this in order to save everybody a
10 lot of time, energy, and effort. I have no doubt that counsel
11 for the government and the defense are fully immersed in the
12 law and the facts of this case and will certainly be ready to go
13 on the law and the facts even if they have considerable more
14 hard work to do, as is always true, in the three remaining
15 weeks before trial.

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1 THE COURT: Their readiness and preparedness are ably
2 and fully demonstrated in their various thorough motions in
3 limine as to which I am preparing to rule, in their proposed
4 jury instructions which I have not intentionally reviewed, but
5 I thought I saw that they were in excess of 100 pages, and in
6 the defense motion to dismiss this case, which is still
7 pending.

8 So we will pick a jury on November 20, maybe 21 if we
9 need it, as scheduled, and we will have opening statements and
10 the government's first witnesses on November 27 here in this
11 courtroom as stated.

12 Just to close the legal loop, because the thrust of
13 the defense letter over the weekend was the defendant seeking
14 to adjourn the trial until January of 2018.

15 So my conclusion is that having read all of the
16 letters -- I think one dated the 3rd, two dated November 5 --
17 and having reviewed the applicable case law, respectfully no
18 further adjournment is warranted or feasible for the following
19 additional reasons, in addition to the chronology that I just
20 outlined:

21 One, we are on the eve of trial, two weeks from
22 picking a jury and three weeks from the trial. As I said
23 before, all the pretrial filings are in, and they are sub
24 judice.

25 Two, defense counsel agreed that the November 27,

1 2017, trial date was adequate to accommodate all aspects of the
2 case, including foreign depositions.

3 As the government mentions in its letter, it referred
4 to a conference that we had. I forget the date of the
5 conference, but the government said that defense counsel
6 indicated that an adjournment to the currently scheduled trial
7 date of November 27, 2017, would be sufficient to address the
8 defense's anticipated need for testimony from foreign witnesses
9 noting "that's why we proposed it."

10 Defense counsel also recognized that, "We may find
11 ourselves in the position where, if we don't have the time to
12 do it, that your Honor has our feet to the fire and may say
13 it's too late." I think those quotes are found also in the
14 government's letter of November 5, 2017.

15 Three, defense has failed to file a Rule 15
16 application for foreign depositions, notwithstanding the fact
17 that foreign depositions have been discussed on the record for
18 months in this case.

19 Four, the Rule 15 process, even if it ever could be
20 completed, would delay the trial at least, at least, well into
21 2018 with both defendants in this case sitting in jail, and
22 that is something that we should not countenance.

23 Such a delay and such an adjournment would totally
24 disrupt these proceedings, and in my judgment, be unfair to the
25 defense. There are a series of citations cited in the

1 government's letter of November 5 which I have reviewed, those
2 cases, and I incorporate the case law citations from the
3 government's letter into this ruling.

4 So, with that, I would like to turn to the protective
5 order which is, after all, the subject of today's hearing and
6 which defense counsel has sought to eliminate or have
7 eliminated or modify.

8 I'm happy if defense counsel and/or the government
9 wishes to be heard. I'm also prepared to decide the matter on
10 the submissions. It's your call.

11 MS. FLEMING: Your Honor, I'd like to be heard on the
12 protective order. As you said before, we tried to work within
13 it. It's been, to a significant degree, unworkable as we've
14 tried to interview witnesses and prepare. I want to emphasize
15 this is not so that we can in any way make public, take it out,
16 or have it be wholesale or publish the information that is
17 here.

18 I'll focus on the recordings in particular. We've
19 cited as an example to the Court that there were four
20 recordings which the government contended contained the voice
21 of our client. One of them we can prove intrinsically that it
22 does not contain the voice of our client.

23 But, unfortunately, it requires playing the recordings
24 for people who are on the recordings or other people identify
25 the voices on the recordings or to help us understand the

1 transactions on the recordings that involved the banks or other
2 places or people that are on the recordings.

3 We have spoken with the government and talked about of
4 course we will keep them. We are officers of the court.
5 Whoever has access to these materials, we've advised them of
6 the protective order. We've had people sign and provide them
7 to the Court under seal, those people who have done it so far.
8 We will of course continue to keep that with anybody who is
9 there.

10 We have had some people who are concerned about giving
11 their personal home information to the court as opposed to,
12 perhaps, employment information. As we told the government,
13 when we're able to reach people, we will know how to get them
14 if we need it. We really have found it unworkable.

15 I advised the Court that on our first trip it was
16 narrowed that we played a recording for someone, believing it
17 was okay under the protective order, and on our second trip,
18 realized it might not be. We didn't play recordings for
19 someone, even though that person we believed was on the
20 recording. So we were unable to do it. On the first trip, it
21 did in fact confirm that it is not our client on the recording.
22 It is someone else.

23 That's something that we really need to be able to do
24 in terms of putting together a defense in this case. It has
25 hampered us because we have tried to abide by the protective

1 order. We obviously don't want to be in violation of an order
2 of this Court. We take it very seriously.

3 So we are asking for a modification of this. It has
4 hampered us in terms of what we are doing. We are still trying
5 to get facts together in terms of moving forward. We do have
6 foreign witnesses, several of whom who will come here, but
7 others who are unwilling to come here.

8 Judge, I'm just going to say parenthetically, we were
9 going to request permission to file under seal today. We have
10 a Rule 15 application ready, and we've given summaries to the
11 government of our witnesses. We could get them done in the
12 next two weeks to get these done before trial.

13 In any event, in terms of doing the fact finding,
14 again -- I really emphasize -- that we really are seeking this
15 so we can accomplish our jobs as defense. We do not seek to
16 publish this or make it in any way out in the open.

17 We do understand the concerns of privacy no, which is
18 why we have asked and the government has consented to us filing
19 under seal our witness information pending it becoming public
20 at a trial.

21 That's really what our concern is. We don't want to
22 be in violation of an order, but we really need to be able to
23 confirm or help people confirm for us whether someone is just
24 background on the recording or is part of the a transaction and
25 help us follow up on a transaction.

1 MR. ROCCO: Judge, if I may, since I'm the culprit.
2 We entered into a stipulation before we received any discovery
3 from the government, including my clients under Rule 16. I saw
4 the protective order as a key to the government's discovery and
5 the only way that we would get access to the government's
6 discovery without imposing and burdening the Court
7 unnecessarily.

8 I agreed to it with the understanding that we could
9 come back to the Court if this proved unworkable and
10 problematic and ask the Court to release us from this
11 disability. I was out after a serious surgery for six weeks as
12 I explained to the Court last time.

13 In that period, Ms. Fleming and Mr. Thornhill and
14 others went to Turkey and started to interview witnesses and
15 learned in that trip and in another trip in earlier October
16 that the protective order prevented them from doing things that
17 we needed to do.

18 So, frankly, Judge, I can't imagine that that
19 stipulation is a stipulation forever, especially in a criminal
20 case. We're not even with the government. The government has
21 had any meticulous chronology the Court set forth.

22 The government has had more than three years to
23 investigate this case. The indicted case was originally two
24 years ago. Mr. Zarrab was scheduled to go to trial six months
25 after he was arrested. Mr. Atilla was concerned about jail.

1 Obviously he's not a person that wants to spend any time of his
2 life in jail. Mr. Zarrab is not here today.

3 The questions that have arisen in the use of that
4 protective order and the burdens it has presented us have been
5 really problematic. That's why we went back to the government
6 to seek a modification of the protective order. When the
7 government refused, obviously we were forced to present the
8 issue to the Court.

9 THE COURT: I thought they did agree to some
10 modifications of the protective order.

11 MR. ROCCO: Not the essential modifications that we
12 proposed, Judge.

13 THE COURT: You originally proposed that you eliminate
14 the protection order. Two parts.

15 MR. ROCCO: Judge, we understand the practicalities,
16 and we understand the government's need for protection here.
17 We're not looking to compromise the government's investigation.
18 We're not interested in compromising national security. We're
19 interested in adequately defending Mr. Atilla.

20 THE COURT: Sure.

21 MR. ROCCO: In going forward with discovery, it's one
22 thing at the inception of the case to agree to a methodology,
23 but if that methodology doesn't work, especially where a
24 defendant has a constitutional right to a fair trial and due
25 process in a criminal case, we saw the need to come back and

1 ask the Court to modify the agreement and the order that was
2 based on an agreement, a stipulation.

3 When the government refused to do that, Judge, give us
4 the relief we thought we needed, and we stopped well short
5 vacating the protective order. We asked to come back before
6 Court.

7 THE COURT: Does the government wish to be heard?
8 Mr. Lockard?

9 MR. LOCKARD: Yes, your Honor. There are a couple
10 things about the chronology and about the content of the
11 protective order that I think are not correctly reflected in
12 the discussion that you've just heard.

13 First, as a matter of timing, the discovery was
14 provided to defense counsel well before the protective order
15 was entered. There was an agreement that they would maintain
16 that discovery as an attorneys'-eyes-only basis, but we did not
17 want to delay their access to it while they discussed a
18 stipulated protective order.

19 THE COURT: I think Mr. Rocco agrees.

20 MR. LOCKARD: So there is no sword hanging over
21 anybody's head. There was no extortion here in getting a
22 protective order. This was a protection order that was
23 stipulated to between the parties.

24 As the Court knows, there are a variety of ways of
25 formulating how to get out of a stipulated protective order,

1 but they all require a fairly high showing that has come
2 nowhere near to being made here.

3 First, just under the terms of the protective order as
4 it exists, there is a category of discovery that can be shown
5 to prospective of witnesses or overseas persons without any
6 requirements or any restrictions under the protective order.

7 There is a mechanism for the defendant and his counsel
8 to obtain the Court's authorization without any notice to the
9 government to show certain materials to specified individuals.
10 It just requires that the people who see those materials, to
11 sign a stipulation acknowledging the terms of the protective
12 order and acknowledging the Court's jurisdiction to take steps
13 to enforce it.

14 So there has been no showing whatsoever that defense
15 counsel has tried those procedures and they haven't worked. We
16 have no idea whether they have been tried because it doesn't
17 require any notice to the government, but certainly there has
18 been no representation that they have actually tried to work
19 within the protective order.

20 In addition, as the Court noted, the government has
21 offered certain modifications to address the concerns raised by
22 defense counsel. Specifically, when this was first raised to
23 the Court in their October, I believe, 20 letter, there were a
24 handful of specific issues that were raised, and we made
25 proposals that fully addressed each of those with one

1 exception.

2 There was an issue raised about being able to play
3 recordings to people who were participants. We agreed that we
4 would modify the protective order so they could be played for
5 people who were believed to be participants.

6 There was an issue raised about electronic
7 communication which were not emails, and we proposed a
8 modification to address exactly that concern. There was a
9 question raised about disclosing United States bank financial
10 transactions, and we made a proposed modification to address
11 exactly that concern.

12 So each of those substantive issues that were raised
13 in the October 20 letter, we made a proposal that we think both
14 protects the real, legitimate, in fact, stipulated to
15 governmental interest here in being able to control and
16 document the disclosure of information that has been developed
17 in the course of a national security investigation, information
18 and evidence that has been obtained from a variety of sensitive
19 sources.

20 We've proposed reasonable modifications to address
21 exactly the concerns the defense counsel raised. I think the
22 only concern that we cannot agree to a modification on is the
23 idea that the individual as to whom the information is shown or
24 disclosed can somehow withhold key information to identify who
25 those people are.

1 The idea that we're going to have a protective order,
2 that we're going to have a disclosure stipulation so that
3 people overseas who are already very difficult to enforce the
4 order against in the first place, can then go ahead and
5 withhold the information that is necessary to both specifically
6 identify those people and to locate them just robs the
7 protective order basically of all of its force entirely.

8 So we think that including information to sufficiently
9 both locate and specifically identify those people not to be
10 disclosed to the government but to be disclosed to the Court is
11 an important requirement, and if there are individuals who are
12 not willing to provide that information, it seriously
13 undermines our confidence that they will abide by the terms of
14 the protection order in any event.

15 So that's the government's response to the motion to
16 modify or vacate. Despite that we have not reached agreement
17 with Mr. Atilla's counsel about the protection order, we are
18 still willing to enter into the modifications that we have
19 previously proposed.

20 THE COURT: I take it you would have no quarrel with a
21 person giving a work telephone number as opposed to a home
22 telephone number?

23 MR. LOCKARD: The concern about that, your Honor, is
24 that people change jobs. So, if all you have is a name and a
25 former work address, it makes it very difficult to know who

1 that person is or where they are.

2 We don't know who these witnesses are, potential
3 witnesses are. We don't know what kind of employment they have
4 or what kind of employer they have. We don't know how regular
5 or institutional or not these employers might be.

6 It's very difficult to know what that means in terms
7 of actually identifying and notifying people.

8 MS. FLEMING: Judge, to the extent that people were
9 worried about their homes, we obviously are talking to bank
10 personnel and things like that. We really only ran into the
11 issue with one person. Everyone else we provided it to the
12 Court.

13 The issue really was we have said to them that we will
14 obviously make sure that they would provide their employer's
15 information. If they're not employed, we would have
16 identifying information.

17 If we are able to get a hold of them -- we're officers
18 of the Court -- we will be able to provide the information
19 about how we got a hold of them. Those concerns can be put
20 aside. This is in a country in which we just did a reading on
21 how many wiretaps there were.

22 THE COURT: Counsel makes a point that there is a
23 provision under the protection order which, for example,
24 hypothetically if there is one person who you wanted to supply
25 his or her work phone instead of a home phone, you could, even

1 without involving the government, make an application to me. I
2 never got such an application.

3 MS. FLEMING: Judge, here is the problem. Turkey is
4 seven hours ahead of New York. The interviews are at times --
5 most of the interviews we've done have been at nonbusiness
6 hours, including when it's been the middle of the night here
7 when you've had a witness in front of you.

8 There have been recordings where we said, let's call
9 the Court, and it's been 3:00 in the morning. Not to mention
10 you've just given us an order. Your rules don't allow
11 telephone calls into chambers.

12 THE COURT: There are a couple different issues there.
13 I don't really view it as my function to be 24/7 available for
14 phone conversations.

15 MS. FLEMING: We agree with that. We accepted
16 everything that they said as a modification. We asked them to
17 go a little farther. For example, on the recording, the voice
18 identification is not an insignificant issue here.

19 THE COURT: I was going to ask this before. I'm not
20 quite understanding. So you want to ask someone, other than
21 Mr. Atilla, for example, whether that's Mr. Atilla's voice on a
22 particular recording?

23 MS. FLEMING: Or it may be someone else's voice that
24 may not even be Mr. Atilla but there's somebody allegedly a
25 coconspirator here. Remember we have a lot of people who we

1 understand the government is going to try to offer recordings,
2 if our motion to preclude is not granted. Therefore, we want
3 to find out who the voices are. There is a significant issue
4 on misidentification here.

5 THE COURT: How would that come in, for example, into
6 evidence? Somebody says, oh, I don't think that's Mr. Atilla's
7 voice. I think that's my uncle Harry.

8 MS. FLEMING: Either a witness could testify to it or
9 in the case of the person who going to say, oh, that's me and
10 not him, we could go to the witness and say, is this you?
11 Could you please identify yourself on this.

12 It's not easy. It's in Turkish. It's a difficult
13 process because it's in Turkish and people who speak and
14 understand Turkish understand this much better than we do.

15 We're not playing this on air radio saying, whose
16 voice is this? People were making educated guesses as to who
17 this might be and what these transactions are they're talking
18 about could lead us to who could help us with this. It is a
19 very limited group of people, and your Honor will have a list
20 of who it is that we have talked to about this.

21 This is core evidence that the government, I believe,
22 intends to offer in this case. It has really been difficult.
23 We can't use the English version of the transcripts to show
24 anybody because that's precluded, and we can't play the
25 recordings to have somebody try to help us identify what's

1 going on in it.

2 This isn't go play it willy-nilly anywhere. This is
3 really targeted with a limited number of people with whom we're
4 speaking, including people who are involved in this bank and
5 these transactions.

6 If they hear a voice and they say it's not theirs
7 which they've already said it's not theirs and we think it's
8 theirs. And I don't want to ever be accused of, you played it
9 for me. It's not so and so.

10 THE COURT: I do think he addressed that problem.

11 MS. FLEMING: He did. He said if I think it's there.

12 THE COURT: So I don't really get what's remaining as
13 the problem.

14 MS. FLEMING: There could be recordings, for example,
15 with the codefendant and somebody that he has that we want to
16 say, do you recognize these voices?

17 THE COURT: That's not hearsay for a third party to
18 say whose voice that is?

19 MS. FLEMING: We're trying to find out what's going on
20 here.

21 THE COURT: I'm just trying to understand your
22 problem.

23 MS. FLEMING: The problem --

24 THE COURT: I think they said that you could play it
25 for people whom you believed are on the recording.

1 MR. ROCCO: Your Honor --

2 THE COURT: No. That's the other thing. When we get
3 to trial, you're going to do one witness, and you're going to
4 do another.

5 MS. FLEMING: The issue really is that we are
6 confronted with Turkish recordings, some of whom we believe had
7 misidentified the speakers, including people who aren't
8 physically there but other people we've dealt with them we
9 believe can identify the voices.

10 If they tell us who those people are on the voices, we
11 can then follow up on it with an investigation. It's the same
12 way the government investigates, we also investigate, by
13 following up to see if it's there. If it leads to something,
14 great. If it doesn't, then it doesn't.

15 But by not being able to follow up on that step while
16 we're there in Turkey at whatever hour it is, it's a problem
17 for us. It's limited instances. This isn't 150 recordings
18 that we want to play, but there are a number of them that fall
19 into that category.

20 THE COURT: You want to ask people if this is your
21 voice on this recording?

22 MS. FLEMING: That part we have several of those. The
23 government has already said that's okay. They don't mind if we
24 do that. There is a second part where we want to say, do you
25 recognize the voices on this recording?

1 Because we believe that the government has accepted
2 misidentifications of the people speaking Turkish on it. You
3 probably haven't read it yet, Judge.

4 One of the allegations in the complaint is that the
5 FBI agent swore that she identified Mr. Atilla's voice from a
6 YouTube video. It's not him.

7 THE COURT: How do you want to establish that it's not
8 Mr. Atilla's voice?

9 MS. FLEMING: Well, we played a recording for the
10 person who is on that because we were able to figure out from
11 the conversations and other evidence, and he has confirmed that
12 it was him, not Mr. Atilla.

13 THE COURT: And he's going to come and get on the
14 stand and testify, that that's me?

15 MS. FLEMING: He's assured me he's willing to testify
16 via a Rule 15 deposition.

17 THE COURT: We also crossed that bridge.

18 MS. FLEMING: I was hoping, your Honor, you're going
19 to allow us to file under seal that application before you deny
20 it.

21 THE COURT: I already did. We are two weeks from
22 selecting a jury. For the reasons I already said, it's too
23 little and too late. As I said in the ruling, the issue of
24 foreign depositions has been discussed here since before June,
25 maybe May, whenever. No application has ever been made to this

1 minute.

2 MS. FLEMING: It has, your Honor.

3 THE COURT: It has not been made. It first came up in
4 your letter on Friday afternoon that you were interested in
5 making such a filing.

6 Where was the filing?

7 MS. FLEMING: Your Honor, we have discussed it --
8 you're right -- at proceedings. There was a superseding
9 indictment in this case.

10 THE COURT: I don't say it just to be technical. Just
11 a Rule 15 filing has to meet a threshold, a bar of elements
12 that explain why such a deposition should be allowed. It's not
13 an easy burden.

14 MS. FLEMING: We are aware of that, and that's why
15 several fact-finding trips to Turkey precede this application,
16 your Honor. The reason why is we needed the Court's permission
17 to file it under the seal, we needed the consent of the
18 government before we could approach the Court. We have it. We
19 would ask permission that we file it and you review it before
20 you deny it.

21 THE COURT: I already did. I'll keep that request
22 under advisement.

23 MS. FLEMING: Even if not, I'll ask that the Court
24 take it under seal so that we have it as part of the record.

25 THE COURT: I got it.

1 MR. ROCCO: Your Honor, may I concur with Ms. Fleming?

2 THE COURT: Sure.

3 (Pause)

4 MS. FLEMING: Mr. Rocco, reminded me, and it is true,
5 before this superseding indictment -- the superseding
6 indictment set out in detail what the allegations of the
7 government are.

8 If you compare our motions to dismiss on the first one
9 we were involved in and this one, we think it's a shifting
10 theory, as a matter of fact. We think that the facts have
11 changed significantly in terms of at least our understanding of
12 what's involved here.

13 As I said, we've made two trips to Turkey and plan
14 another one very shortly. We believe that we can get these
15 depositions done. It's not easy, and we understand the Court
16 has its obligations. Our client has been extremely anxious to
17 go to trial.

18 We have had to explain to him, more difficult to
19 explaining to the Court, why we have needed more time. The
20 amount of work that we have needed to try to get even to this
21 point has been overwhelming, even with a substantial number of
22 pretty experienced lawyers doing it.

23 I am telling the Court as an officer of the court who
24 has done this an awfully long time, we have needed the time,
25 and we do need the time. The Rule 15 application we have

1 identified in the report.

2 The government got yesterday a fairly detailed proffer
3 of what our witnesses are going to say. This is before we've
4 gotten their witness list or their marked exhibits.

5 We don't even marked exhibits or a list of the
6 exhibits they're using at trial. We have a superseding
7 indictment that came down in September. It's the first week in
8 November, Judge. It's not that we have been sitting here for
9 months and months and months and letting grass grow. We have
10 really not.

11 I guess, at a minimum, I would ask that we be entitled
12 to give you a written submission for the record at least of
13 what we have been doing that would be holding this up.

14 THE COURT: I have no doubt. I'm not looking to be
15 the teacher looking at your homework. I'm just saying that
16 there was time. The issues were discussed, and I think it's
17 unrealistic and unfair to present a Rule 15 application two
18 weeks before we're selecting a jury. That's all.

19 MS. FLEMING: Judge, the unfairness is to the
20 defendant who is entitled to a fair trial. We don't even
21 have --

22 THE COURT: It's not only. There is the integrity of
23 the proceeding. It's the government preparing its case. It's
24 not just the defendant. Of course I would guarantee -- and I
25 do guarantee -- the defendant a fair trial.

1 Notwithstanding what you've said today and what you've
2 said in your submissions and given the logistics of taking
3 depositions in Turkey -- we had this specific discussion in the
4 transcript months and months ago -- I would have thought that
5 if there were going to be those depositions -- by the way, you
6 say in these submissions that these are people who may be
7 witnesses.

8 You know, the trial won't go smoothly --

9 MR. ROCCO: My apologies, Judge. I understand that.
10 I'm sorry.

11 THE COURT: So just that. Here we are two weeks
12 before. So the answer is no for the reasons that I said up
13 until now. I'll take under advisement whether it would be
14 helpful to have it in the record.

15 Did you want to address any of these deposition
16 problems that the defense is facing?

17 (Pause)

18 MR. LOCKARD: Your Honor, not very much. I will just
19 add on the Rule 15 issue. Just one minor correction. I think
20 Ms. Fleming indicated that the government's consent was
21 required before any such motion was filed. That's of course
22 not the case.

23 Although we have repeatedly offered to discuss any
24 proposed Rule 15 depositions over the course of the pretrial
25 proceedings so that if there are issues that can be consented

1 to or procedures that can be adjusted, we can have that
2 discussion.

3 I think, as Mr. Atilla's counsel noted, we were first
4 provided information about the proposed Rule 15 depositions
5 over the weekend.

6 THE COURT: I don't recall it in great detail, but I
7 do recall that we had discussion months ago here, and I
8 suggested that you and the government get together and talk
9 about these depositions.

10 Or are these depositions going to be attempted to be
11 submitted as evidence and is the government interested in
12 cross-examination? Because if they just had direct testimony,
13 how would there be any cross-examination if the witness is not
14 going to be at the trial? There were all those logistics.

15 I thought those conversations were going to take place
16 and the possibility of stipulating in lieu of depositions, if
17 the government was not going to Turkey, for example, to do
18 cross at any deposition that was held. I never heard another
19 word about it until late Friday afternoon.

20 MR. ROCCO: Your Honor, may I. I really feel that I'm
21 responsible for this.

22 THE COURT: I'm not trying to blame anybody. I'm just
23 saying, we are here at eve of trial, and one of the cases that
24 is specifically cited in the government's letter specifically
25 says no Rule 15 depositions on the eve of trial. That was one

1 of the bases for that ruling.

2 How could it be more eve than we are today, two weeks
3 from picking a jury? How could it be more eve than three weeks
4 today having the government's opening statement and yours and
5 going to trial? That's what I'm saying.

6 Without any of that meet-and-confer, does the
7 government want to go to Turkey? I remember in fact it was
8 also discussed maybe it wouldn't be in Turkey. Maybe it would
9 be in a third country that would be more conducive to everybody
10 going.

11 Well, maybe there would be a stipulation or could be a
12 stipulation. The government -- I don't want to speak for the
13 government. I certainly wouldn't approve of them introducing
14 a recording saying that it's me when in fact it's Judge Pauley,
15 and I can't imagine that they would want to do that.

16 So that's what I don't understand. It's sort of a
17 cumbersome situation -- this is not blame -- that everybody has
18 been placed in on Friday. I think I first saw it at 4:00 or
19 4:30 in the afternoon. It makes no sense to me.

20 MR. ROCCO: May I? I really must apologize for this
21 because, in large part, it's due to my absence. It's been
22 almost two months.

23 THE COURT: I appreciate taking responsibility, but I
24 don't think it's fair, even what you're saying, because when
25 you proposed the November 27 date, you said in fact that that

1 was needed to accommodate the time that you were not there,
2 among other reasons. So it's not fair to go back to that.

3 MR. ROCCO: If I may, Judge. What I did say to the
4 Court was that Mr. Atilla was insisting limiting me to the
5 amount of time that I could request. I did not believe -- I
6 would try my damndest to do what needed to be don in the
7 period that I requested an adjournment for. Mr. Atilla would
8 not allow me to ask for any more time.

9 That goes back to the date, as your Honor has quoted
10 from I think it was the day he was detained on the original
11 indictment in this case, Mr. Atilla wanted to go to trial the
12 following day.

13 THE COURT: I appreciate that. And as I said, that is
14 one of the reasons that we are going to trial on November 27.

15 MR. ROCCO: If I can also say, Judge, Mr. Atilla has
16 no concept of what the American system of justice is. He has
17 no idea of what a trial is.

18 THE COURT: You know what. He has a better idea of
19 you or me what it's like to sit in jail waiting for a trial.
20 That's why we have a Speedy Trial Act in the United States.

21 MR. ROCCO: But he has a right to waive that, Judge.
22 He has a constitutional right.

23 THE COURT: Sure.

24 MR. ROCCO: He's come to a realization, and that's why
25 he's so penorious in allowing me to ask for additional time. I

1 told Mr. Atilla that I want the to ask for 90 days, and I
2 didn't do that.

3 I was prepared to offer a resignation on September 25,
4 which was the day that I returned from my surgery, because I
5 didn't think that I could get the work done. I realized that
6 if I was going to do that, I would put Mr. Atilla in an even
7 worse position and your Honor would be angry thinking that I'm
8 playing games with the Court.

9 So what I did was I hung myself by my own petard. I
10 confess that. This was not practicable to be accomplished in
11 30 days. I've come back to work since September 25, and there
12 hasn't been a day that we've taken off, and we've been working
13 12 to 15 hours a day, Ms. Fleming and our teams. That goes a
14 little bit beyond than what the Court needs to know. I
15 understand that. Judge, we can't --

16 THE COURT: Just to save you time. I am not moving
17 the trial date.

18 MR. ROCCO: I got that. I understand that. I
19 understood it. Your Honor made it clear. When you started,
20 even before you ruled, I understand what your Honor's ruling
21 is.

22 All I want the Court to understand is I really want
23 the record to reflect this is an impossible task. These are
24 witnesses who have exculpatory evidence that they are prepared
25 to offer. They are prepared to testify. They are not prepared

1 to appear in the United States.

2 THE COURT: And they're not prepared to be
3 cross-examined?

4 MR. ROCCO: Of course, they are, Judge.

5 THE COURT: How are they going to be cross-examined?

6 MR. ROCCO: Video conferences, Judge. I did a video
7 conference in front of Judge Rakoff 12 or 14 years ago.

8 THE COURT: We had this discussion on the record.

9 MR. ROCCO: In this case?

10 THE COURT: Yes, we did.

11 MS. FLEMING: It was with me, your Honor. I suggested
12 live during the trial, and the Court said no, not during the
13 trial. It would have to be by deposition. That's my
14 recollection of our conversation.

15 MR. ROCCO: Your Honor, just for the record, these are
16 critical witnesses to Mr. Atilla. I don't think that
17 Mr. Atilla understood the work that needed to be done before we
18 could identify prospective witnesses.

19 Judge, part of what you do in doing a pretrial
20 investigation is determine what witnesses you're going to call.
21 They don't appear on your doorstep full blown.

22 You can interview a witness and come to a conclusion,
23 even if the witness is favorable to your client, that the
24 witness is in-credible and isn't worthy of belief. So we have
25 an obligation to put to the system, as officers of the court,

1 to vet witnesses.

2 And identifying witnesses, interviewing witnesses,
3 takes an enormous amount of time, especially when we're doing
4 it an ocean and a continent away, especially when we're doing
5 it in foreign languages, especially when we ask to talk to
6 witnesses and schedule a meeting at 12:00 in the afternoon and
7 don't show up until 4:00 or 6:00 at night.

8 These people don't understand the sanctity of the
9 American legal system. They're foreigners. So we've tried our
10 best, and we've been able to identify witnesses, and the
11 witnesses that we are offering that we're proffering are
12 witnesses who provide exculpatory evidence, Judge.

13 However we've gotten here, I'm telling you that
14 Mr. Atilla is being deprived of his right to interpose a fair
15 defense, a vigorous defense, and he's entitled to that under
16 the law.

17 THE COURT: It's no help to the Court to get half a
18 deposition, whether it's written, whether it's video, however
19 it's taken, preferably live. So there is no way a jury can
20 assess the credibility of a witness, unless that witness is
21 subject to cross-examination in the same way that the direct
22 was adduced.

23 MR. ROCCO: Your Honor, what the government --

24 THE COURT: I'm not doing anything. I would have
25 taken depositions, if you want to know what I would do, but

1 it's really not relevant what I would do. I would have had
2 those depositions months ago. That's what I would have done.

3 MR. ROCCO: Your Honor, I am trying to explain --
4 perhaps I have not done it adequately -- why these depositions
5 didn't occur. I do want to say just one further thing. We're
6 not proposing half depositions. What we propose is to have the
7 government participate and cross-examine witnesses of course.
8 I was told on earlier in this case that he is not traveling to
9 Turkey.

10 THE COURT: In that conversation it was also discussed
11 briefly -- I thought it was a good idea. I don't know whatever
12 came of it. I do remember the government saying it was not
13 going to travel to Turkey, but there was an alternative that
14 the witness could travel to London or someplace that everybody
15 could go to.

16 MR. ROCCO: For the record, Judge, these are not
17 people under our control.

18 THE COURT: To my knowledge, no one has ever asked
19 them that.

20 MR. ROCCO: I'm sorry?

21 THE COURT: To my knowledge, that's the problem. To
22 my knowledge, none of this has been explored. It was explored
23 here. It wasn't explored there. You're kind of doing it as --

24 MR. ROCCO: As an officer of the court, I'm
25 representing to the Court that these people are not under our

1 control. If your Honor is skeptical of that --

2 THE COURT: I'm not suggesting they are. I can't
3 force them to come here if they don't want to come here if they
4 don't want to come.

5 MR. ROCCO: Nor could we force them to go to a place
6 outside.

7 THE COURT: No, but you could ask them. You suggested
8 to me --

9 MR. ROCCO: Your Honor, we have. If I could just
10 finish this one thought, sir.

11 THE COURT: Yes.

12 MR. ROCCO: In the Rule 15 application that
13 Ms. Fleming has asked your Honor to consider accepting, we say
14 that there are two witnesses who are willing to come to the
15 United States.

16 THE COURT: So that's easy. So how many other
17 witnesses?

18 MR. ROCCO: Four others.

19 THE COURT: All right.

20 MR. ROCCO: Each of the four others provide
21 exculpatory information, testimony, regarding Mr. Atilla. By
22 the way, Judge, if I were the government, I'd be the happiest
23 people on the face of the earth because we've done the
24 investigation. We're given the opportunity to mine the
25 testimony of these people, cross-examine them, and bring out

1 whatever the truth is.

2 THE COURT: Where? Not here; right?

3 MR. ROCCO: I can't force them to come here.

4 THE COURT: Not here.

5 MR. ROCCO: In Turkey by video conference. They could
6 be cross-examined. Your Honor, by the way, we can examine the
7 witnesses directly on videotape here from the United States,
8 and the government can cross-examine the witnesses by video
9 conference so that the jury doesn't -- so that's essentially --

10 THE COURT: Is that what you're proposing?

11 MR. ROCCO: I'll propose it. Your Honor, I'd be crazy
12 not to propose it.

13 THE COURT: I don't think --

14 MR. ROCCO: It was not what we proposed.

15 THE COURT: You were going to take it there, and then
16 they were going to do it video from here. Right?

17 MR. ROCCO: I don't know if we even got to that level,
18 your Honor.

19 THE COURT: That's my problem.

20 MR. ROCCO: I'm sorry.

21 THE COURT: We're going to take a break. You're going
22 to meet-and-confer with the government -- these
23 meet-and-confers could get everybody a lot further than they
24 have been. I don't know what seems to be the impediment -- and
25 see if you can't come up with some proposed solution here, and

1 then we'll reconvene. So you can use the jury room for that,
2 folks. Thanks a lot.

3 (Recess)

4 THE COURT: So where we were or where I had hoped we
5 were, I was about to give you a ruling on the protective order
6 issues. That is what I propose to do. After that you can let
7 me know where your meet-and-confer brought us.

8 So, by letter dated October 20, 2017, and dated
9 October 26, 2017, the defense has applied to vacate or modify
10 the protective order that was entered on consent on or about
11 June 19, 2017.

12 The defense argues that the protective order has
13 impeded its ability to interview in Turkey prospective
14 witnesses and states that some potential witnesses have
15 declined to sign the protective order "out of concern regarding
16 the submission of their personal information to a United States
17 court."

18 Defense also states that it has been limited in its
19 ability to play recordings and show documents to potential
20 witnesses, and counsel states that much of the material
21 provided in discovery has been available through other means.

22 In its October 26 letter, the defense attached a
23 letter dated October 24, 2017, which was a letter it had sent
24 to the government. In the October 24, 2017, letter, defense
25 counsel accepts the government's proposals to modify the

1 protective order but also contends that the government's
2 proposals do not go far enough.

3 Defense counsel restates the government's I'll call
4 them agreed-to enlargements to the protective order as follows.
5 These are those that the government has presumably agreed to:
6 One, that defense counsel may play a recording for anyone it
7 believes in good faith is a participant in the recorded
8 conversation; two, defense counsel may show all electronic
9 communications to or from a Halkbank employee to any current or
10 former Halkbank employee; and three, defense counsel may show
11 any current or former employee of Halkbank financial records of
12 U.S. Banks'.

13 In the government's October 26 letter, the government
14 describes this modification somewhat differently. The
15 government says that all of the financial data in the discovery
16 could be shown to but not left with Halkbank employees.

17 With the proposed modifications, defense counsel
18 states it is fine with requiring a signed acknowledgment of
19 having received a copy of the protective order from anyone to
20 whom we show any protected materials and filing such
21 acknowledgment under seal.

22 Defense counsel also states that we will have each a
23 potential witness to whom any protected materials are shown
24 include work-related contact information. The providing of
25 work-related contact information, as we've discussed a few

1 minutes ago, was not included in the government's 10-26-2017
2 letter. And we've heard, during the course of this hearing,
3 this conference, the government's response to that issue.

4 By letter dated October 26, 2017, the government
5 states that the protective order agreed to by the parties
6 properly balances the defendant's need to prepare for trial
7 with the national security interests at play.

8 The government also states that Mr. Atilla's "bald
9 declaration that the government's investigation has come to an
10 end is a nothing but incorrect speculation and that Mr. Atilla
11 is simply incorrect when he claims that just because the
12 discovery does not specifically disclose which individuals have
13 provided information to the government, there is no remaining
14 threat to witness safety."

15 The government states further that defendant's
16 proposal to show or play any communication to anyone is
17 "untenable because it essentially creates the possibility for
18 unfettered dissemination of material collected as part of a
19 national security investigation in countries, for example,
20 Iran, Turkey, and Dubai, that are at the heart of the
21 allegations in the indictment."

22 Based upon the written submissions of counsel and the
23 helpful oral argument and having reviewed the government dated
24 June 19, 2017, the Court denies the defense application to
25 vacate the protective order and grants the defendant's

1 application to -- I'm using the phrase -- enlarge the
2 protective order to the extent of the government's proposed
3 modifications to the current protective order as discussed.

4 The Court finds that the government has met its burden
5 of establishing good cause to support the Court's issuance and
6 continuance of the existing protective order. Cites are
7 United States v. Smith, 985 F.Supp.2d, an S.D.N.Y case from
8 2013. Also United States v. Gangi, 1998 WL 226196, a Southern
9 District case from May of 1998.

10 Among other things, the government is reasonably
11 concerned about: One, the safety of others against physical
12 harm; two, the confidentiality of ongoing related
13 investigations; and three, also national security.

14 While courts generally make a finding of good cause
15 before issuing a protective order, the Court need not do so
16 where the parties stipulate to the order, as they've done in
17 this case.

18 If a party takes steps to release documents subject to
19 a protective order or a third person challenges the propriety
20 of the order, then the party opposing disclosure has the burden
21 of established good cause to continue the protective order in
22 effect.

23 The central concern in determining whether access
24 should be granted to documents sealed under a protective order
25 is whether that order was relied upon in the decision to

1 produce documents. Cites include United States v. Benzer, 2015
2 WL 92003065 from the Court in Nevada where the court held,
3 "Good cause remains the standard, even where the parties
4 consent to a stipulated protect sufficient order."

5 Protective orders are routinely granted prior to the
6 production of documents pursuant to 18 U.S. Code, Section 3500.
7 Where there are legitimate security concerns. Cites include
8 United States v. Pascrano, 2006 WL 2270432, an Eastern District
9 case from 2016.

10 Also United States v. Garcia, 406 F.Supp.2d 304, a
11 Southern District case from 2005, also United States v.
12 Williams, 2005 WL 664933, a Southern District case, 2005.

13 Protective orders are also granted pursuant to the
14 Classified Information Procedures Act, so-called CIPA, 18 U.S.
15 Code, at 3, Sections 1 through 16, and Federal Rule of Criminal
16 Procedure 16(d)(1) when the disclosure adversely could affect
17 national security. See also United States v. Aref, 533 F.3d
18 72, a Second Circuit case from 2008; as well as United States
19 have the Farekh, 2006 WL 4444778, an Eastern District case from
20 2016; and United States v. Abu Jihaad, 2008 WL 346121, District
21 of Connecticut, 2008.

22 The protective order in this case has enlarged and
23 modified in accordance with the government's proposals, is
24 tailored further to support counsel's ability fully to prepare
25 the defense of Mr. Atilla.

1 As agreed to in the government's proposed
2 modifications, defense counsel may disclose voice
3 communications to anyone who participated in the
4 communications.

5 Defense counsel may also show electronic
6 communications involving a Halkbank employee to anyone at
7 Halkbank, and defense counsel may also share materials that are
8 available to the defendant from sources other than the
9 discovery.

10 The Court has taken and will continue to take all
11 appropriate steps to ensure that Mr. Atilla receives a fair and
12 speedy trial and to support the presumption of innocence that
13 all defendants enjoy.

14 The Court further directs that the government shall
15 undertake good-faith review periodically of the discovery and
16 the status of pending investigations, national security
17 concerns, and the safety of others and shall advise the Court
18 as to whether and when any further modifications should be made
19 to the protective order.

20 The protective order dated June 19, 2017, was
21 developed and agreed to, as I understand it, by experienced and
22 sophisticated counsel for the defense and the government prior
23 to its submission to the Court to be so ordered.

24 Based upon the record herein, the Court perceives no
25 basis, apart from the enlargements proposed by the government,

1 to depart from the parties' protection order agreement.

2 So that's it for the principal issue of today's
3 conference.

4 Did you want to say anything further with respect to
5 the issue of Rule 15 depositions?

6 MR. ROCCO: Your Honor, we met. We conferred. I made
7 the following proposal. We certainly understand the
8 government's right to participate in the examination of
9 proffered witnesses. We would expect that they would have a
10 full-blown opportunity to cross-examine any witnesses.

11 We have made good-faith efforts to have these
12 witnesses appear here in the United States, but there are at
13 some point four witnesses who have made it clear to us that
14 they will not come to the United States, and there are
15 difficulties with them traveling and visas to travel to other
16 countries. So the depositions essentially would take place in
17 Turkey. We agreed that we would participate in the
18 direct examination from the United States.

19 We would do our direct examination via video
20 conference. The government could do cross-examination via
21 video conference. We would do it at a location in Istanbul
22 that satisfied the government. We would propose that we do it
23 at a video conference center.

24 If we could not get a counselor or official from the
25 embassy, the U.S. Embassy, to attend and monitor the

1 deposition, we offered that we would pay for the government to
2 choose a monitor from a private law firm here in the
3 United States to attend the deposition, to ensure the integrity
4 of the deposition, also to be the custodian of both defense and
5 government exhibits.

6 I think that was our position, Judge. The government
7 said that it would take our offer under advisement. It sounds
8 to me like it will be ultimately rejected by the government for
9 its part.

10 The government raised with us the possibility of
11 stipulated testimony by the defense witnesses, and we advised
12 the government that we would take that under advisement.

13 I think that pretty much covers what I think happened
14 during this meet-and-confer.

15 THE COURT: In your proposal, what do you do about an
16 oath, and what do you do about enforcement?

17 MR. ROCCO: Well, enforcement always goes -- threats
18 of perjury, by the way, I think go to the weight of the
19 evidence. There are a couple cases that essentially say it is
20 not an issue of admissibility. It goes to the weight. The
21 government could argue to the jury --

22 THE COURT: I'm not understanding.

23 MR. ROCCO: Deposition testimony.

24 THE COURT: Yes. Meaning someone perjured themselves.

25 MR. ROCCO: That does not dictate whether it's

1 admissible or not. If they perjure themselves, they could be
2 prosecuted for either obstruction of justice or perjury.

3 THE COURT: Where?

4 MR. ROCCO: Well, in the United States.

5 THE COURT: What jurisdiction do I have over a witness
6 that you find in Turkey and depose in Turkey?

7 MR. ROCCO: Let's take a country other than Turkey.

8 THE COURT: No. Let's take Turkey because that's
9 where it is.

10 MR. ROCCO: If the witness has perjured himself, if
11 the perjurer was brought before the Court, certainly the
12 perjurer could be charged with a crime, and if the perjurer was
13 brought before this Court, the perjurer could be punished for
14 the crime.

15 That's an issue of weight, not admissibility. I think
16 that's one of the government's concerns. Without the
17 enforcement sanction, the reliability of the witness' testimony
18 is questionable, but as I say, I think that's a jury question.
19 It's weight, not admissibility.

20 Oath, your Honor. We could inquire of a counselor
21 official taking an oath. This is a Muslim country. I don't
22 know whether the witnesses would take an oath or whether it
23 would be an affirmation.

24 I don't see why having witnesses present, if in fact
25 it's an affirmation, that wouldn't satisfy admissibility

1 requirements here in the United States.

2 We certainly, as any other issue that we're dealing
3 with where the depositions take place when they take place,
4 what time of day they take place, who the identity of the
5 monitor is, what the location of the examination. We can
6 certainly ensure that the oath itself or whatever the process
7 is, oath or affirmation, is followed.

8 Thank you, Judge.

9 THE COURT: Just to be clear, you're proposing a
10 deposition, not a mechanism for direct and cross-examination
11 during the trial. Is that right?

12 MR. ROCCO: It would be before the trial. We are
13 proposing a deposition, just like in a civil case. We'll have
14 a transcript. Objections during the deposition will be to
15 form.

16 THE COURT: How does the government get to object?

17 MR. ROCCO: As we would to their cross-examination.

18 THE COURT: Let's say they're not going to Turkey.

19 MR. ROCCO: I'm sorry. I didn't make myself clear.

20 THE COURT: I didn't understand.

21 MR. ROCCO: At any deposition, we would conduct the
22 deposition. Direct would be done by us here in New York.
23 Cross-examination would be done by the government here in
24 New York. So there is direct and cross.

25 The government is entitled, certainly entitled, to

1 attend. There are visa issues with the government.

2 THE COURT: To what?

3 MR. ROCCO: To attend the deposition. If we were to
4 do it live, both parties being in Turkey, if we were going to
5 be in Turkey, the government could be in Turkey. It's not
6 practicable for reasons we don't need to burden the record on.
7 I understand that.

8 What I'm proposing is that the parties are essentially
9 situated. We'll do our direct from New York. The people from
10 the U.S. Attorney's Office will do their cross-examination and
11 any further examination from New York as well.

12 THE COURT: So there are two possibilities. You could
13 do that, or you could just do the testimony in that fashion at
14 the trial.

15 MR. ROCCO: Yes. I think it's something that
16 Ms. Fleming has said was offered in the past. That's certainly
17 possible. We could do it during trial.

18 Ms. Fleming has had better experience with that than I
19 have. It can be disruptive. Certainly, Judge, these are
20 important witnesses. Certainly if that's the mechanism that
21 they're available, that's the mechanism that we're prepared to
22 follow.

23 It may be that it's preferable to what we proposed
24 when we met and conferred with the government, simply to do a
25 live feed during trial.

1 THE COURT: Do you want to comment?

2 MR. LOCKARD: Just very briefly, your Honor. I think
3 Mr. Rocco recapitulated some of the concerns that we had
4 expressed about that. I think we have both logistic and
5 reliability concerns about those procedure, including, as the
6 Court noted, how do you administer the oath, where is the court
7 reporter, how do you handle dealing with the exhibits. There
8 are a lot of logistical issues.

9 THE COURT: Including, not only exhibits, I suppose,
10 including recording exhibits.

11 Are these witnesses who are going to be presented with
12 recordings?

13 MR. ROCCO: Perhaps, your Honor. Perhaps.

14 THE COURT: How are you going to do that?

15 MR. ROCCO: We could play the recordings for them as
16 if they were sitting here in the courtroom.

17 THE COURT: You would play them from here, and they
18 hear them?

19 MR. ROCCO: We could play them from here. As I
20 offered the government to have a monitor present. The monitor
21 can travel to Istanbul with the government's exhibits and our
22 exhibits. It will be the monitor of the government's choosing
23 to secure our evidence and their evidence. I don't think
24 that's a difficult step at all.

25 THE COURT: Sorry.

1 MR. LOCKARD: There is also a concern -- we would have
2 to look into this issue, but there is a very likelihood that
3 this kind of procedure would require a request to Turkey under
4 a Mutual Legal Assistance Treaty.

5 Often conduct that involves U.S. personnel taking
6 actions or interviewing people under oath or not under oath in
7 a foreign country requires the concurrence of the host country
8 to do so. That's true in many jurisdictions whether
9 depositions are voluntary or involuntary. It still often
10 requires the host country to authorize U.S. official action on
11 their soil like that.

12 If counselor officials are going to be involved,
13 that's another reason why diplomatic requests may be required.
14 I think there are also two significant issues with respect to,
15 as the Court noted, the reliability of any testimony held in a
16 country where U.S. government personnel cannot travel.

17 It's our understanding, based on a lot of public
18 reporting recently, that there are issues with the issuing of
19 visas between those two countries. It's our understanding
20 based on that public reporting, that not only should we not go
21 there, we cannot get a visa there.

22 So, if you're going to have someone who is a citizen
23 of Turkey, who cannot be extradited from Turkey because they
24 are a citizen being examined by U.S. government personnel who
25 cannot travel to Turkey, it leads one to question how much

1 value an oath has under those circumstances.

2 Your Honor, one last, just so it's out there as
3 everybody considers this. The Court has under Rule 15 the
4 authority to order a deponent to bring documents and other
5 materials to the deposition.

6 The references to the testimony that we've received
7 include references to documentary materials or communications
8 which we would be asking the Court to order be produced by the
9 deponent at the deposition, and it's unclear what force or
10 effect or enforceability that kind of order would have under
11 these circumstances either.

12 So those are the government's concerns, and that's why
13 we're opposed; that if there are proposed testimonial
14 stipulations, that we could consider those in lieu of this kind
15 of procedure.

16 MR. ROCCO: Your Honor, addressing the issue of
17 Turkish involvement and the need to have appropriate letters
18 rogatory or MLATs, we've made that inquiry. We've been told
19 that the depositions are voluntary. We do not need the Turkish
20 government's involvement; that these witnesses are available.
21 They're free to testify.

22 We examined this painstakingly because we were
23 concerned that we would have to proceed by letters rogatory,
24 which is even a slower process than MLAT, but we're told that
25 the Turkish government need not be involved in this at all.

1 Thank you, Judge.

2 THE COURT: So I made my position clear earlier. You
3 should look at the transcript of today's proceeding with
4 respect to the feasibility at this late date of Rule 15
5 application with respect to foreign depositions in terms of
6 whether it's, as I say, feasible, whether it's reliable,
7 whether it's practical.

8 I didn't think so earlier in the proceeding when I
9 ruled as I did because it just struck me -- I could very well
10 be wrong -- that this could not be put in place at this late
11 date, given the fact that we're starting the trial on
12 November 27.

13 So that ruling stands. I will take your submission.
14 From what I've heard, Ms. Fleming, I don't think -- maybe it
15 is. I'd be surprised if your submission is up to date in the
16 sense of covering the issues that have been discussed here
17 today.

18 There is no point if it isn't. If it doesn't deal
19 with those issues that I saw and see as legal and practical
20 hurdles, there's no point in submitting it. You can submit
21 whatever you want, but I'm just saying. I'm sure it doesn't
22 take into account the discussions that you've had with the
23 government at my urging in the meet-and-confer.

24 Personally I think it would make more sense if it did,
25 if it were up to date. Without saying that I'm going to change

1 my mind in any way, if you want to have it in the record and
2 you want me to review it, I'll do that, with those
3 qualifications, just so you understand where I'm coming from.

4 MS. FLEMING: Your Honor, I would like it in the
5 record, and I would be happy to supplement it.

6 THE COURT: That's happened before. I just want a
7 document that, practically speaking, is one that is feasible.
8 If you put it in on its face and it's not going to be workable,
9 there's no point really in my looking at it and then another
10 one comes in which is different. Put your best foot forward on
11 behalf of Mr. Atilla in one submission and get it to me.

12 MS. FLEMING: We'll have it to your Honor tomorrow
13 morning. May we have permission to do it under seal? Because
14 it identifies witness information which the government agrees
15 should be confidential.

16 THE COURT: Sure. I think you should explore a little
17 bit further -- I don't know how far you got in your
18 exploration, but the idea of stipulations of testimony.
19 Frankly, that sounds to me like certainly that's workable,
20 doable.

21 I don't know if you can get agreement with the
22 government, but it strikes me that at this late date and under
23 these circumstances -- foreign language, Turkey, interpreter,
24 voice recognition -- it just strikes me that, as I was
25 suggesting -- I think more than suggesting -- at the outset of

1 today's hearing, I don't think it's feasible, and I don't think
2 it's going to be necessarily fair to both sides.

3 I'll go the extra mile. You're the defense. On his
4 behalf you can submit it. Put your best foot forward, and
5 we'll see where it goes.

6 When are you planning to go by the way?

7 MS. FLEMING: I was waiting to hear the what the
8 Court's order on the protective order was. And by the way,
9 would your Honor like to give us a mechanism? I'm certainly
10 not going to bother you in the middle of the night, your Honor.
11 If we run into a problem, any suggestions for it?

12 THE COURT: I don't know what problems you might run
13 into.

14 MS. FLEMING: We understand that one is now covered.
15 But we also had a situation where we had a transaction being
16 discussed in a recording where we weren't sure what the
17 transaction was, and we thought a witness could help us with
18 it. We didn't believe he was on the recording.

19 So that was one that I would probably be seeking the
20 Court's relief on that.

21 THE COURT: How would I know?

22 MS. FLEMING: I would be asking if we could call
23 chambers. I guess we'll have to try to schedule the meetings
24 with people so that they meet with us late at night so that
25 it's in the business day here.

1 THE COURT: Or you could just do it, and it would be
2 subject to objection.

3 MS. FLEMING: I don't want to violate the order. I
4 would certainly not want to do it.

5 THE COURT: I don't know why you would have reluctance
6 of talking to the other party in the order. It is so ordered,
7 but it is an agreement between you and the government asking
8 them if this, in their understanding, violates the order or
9 not.

10 MS. FLEMING: First of all, it would be 3:00 in the
11 morning for them too.

12 THE COURT: It's okay to call the judge.

13 MS. FLEMING: Judge, we didn't call you. We didn't
14 bother you. We're officers of the court. We really do
15 recognize limitations. We will do our best and work with it.

16 THE COURT: So will we. I think in the
17 first instance, as I was trying to suggest before, you might
18 get further with the government than -- I'm a glass-half-full
19 judge -- than without them. I think that's a fruitful area for
20 you to explore.

21 When you're ready, I will take a look at your
22 submission and see if it changes my mind.

23 MS. FLEMING: Thank you, your Honor.

24 THE COURT: There is one technical thing. For names
25 and places for the voir dire, we've got a lot of names.

1 Usually we ask for what they do or where they live. Just on a
2 casual review, it looks like they're all in Turkey, or many of
3 them are Turkish names.

4 You need to go through that list and get a little more
5 specific as to either where -- if they're people, where they
6 live. If they're entities, what they do and where they do
7 them.

8 MR. LOCKARD: Yes, your Honor.

9 THE COURT: The other thing is since it's a pretty
10 fulsome list, think about a format where we could just hand
11 them to jurors instead of me reading however many hundred names
12 you got here.

13 MR. LOCKARD: We had contemplated suggesting something
14 like that as well.

15 There is one additional procedural issue from the
16 government. In accordance with the Court's instruction for no
17 further filings without advance permission from the Court, our
18 letter had referred to the government's intention to seek,
19 either by stipulation or without a stipulation, a protective
20 order for the disclosure of 3500 materials. We would just ask
21 for the Court's permission to file either a stipulated or not
22 stipulated motion to that effect.

23 THE COURT: There is one other thing. It came up I
24 thought -- maybe I misheard.

25 Ms. Fleming, I thought you mentioned that something

1 had been filed by you with me under seal some time ago, and I
2 for the life of me -- maybe I do have it, but I can't --

3 MS. FLEMING: What we filed under seal, your Honor, is
4 a return from both trips we filed with the Court those forms
5 that people sign that we had shown information to.

6 THE COURT: I don't remember. Maybe they're in our
7 file or something?

8 MS. FLEMING: I believe they are, your Honor. It has
9 shown up.

10 THE COURT: Fair enough. We'll take a look. Thanks a
11 lot. Nice to see you all.

12 MR. WEISER: Ben Wiser for the New York Times on
13 behalf of the press.

14 The defense has referred to making filings under seal
15 related to the deposition proposals, perhaps the government in
16 return.

17 Could we ask that filings be made with redactions but
18 not completely under seal so that we can read arguments and
19 anything else. And if we want to contest redactions, we can do
20 that. Under seal completely doesn't seek to give that
21 conspiracy.

22 THE COURT: Why don't you talk to the government and
23 see if that's a fair point.

24 MS. FLEMING: We're fine as long as witness
25 information is protected. That's fine.

1 THE COURT: I think they have no problem with that.

2 Good point. Thanks.

3 (Adjourned)

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